In the English practice, it is more common to pay the fund to be administered into court and have the trustee discharged, with his own costs, and leave the court to administer the fund according to equitable principles, through the instrumentality of its own appointees: *In re Swan*, 2 H. & M. 34; *In re Burber*, 9 Jur. N. S. 1098; *In re Bloye's Trusts*, 1 Mc N. & G. 488; *In re Woodburn's Will*, 1 De G. & J. 333.

And the distinction between paying the costs of the litigation out of the particular fund or out of the general assets, is there often made to turn upon the question whether the entire fund is paid into court to be administered, or only the particular fund in controversy: *Thomas* v. *Jones*, 1 Drew. & Sm. 134; *Martineau* v. *Rogers*, 8 De G. M. & J. 328.

Where the party does not bring the particular fund into court, but asks for advice generally, the costs of all parties who have acted in good faith, as between attorney and client, must come out of the general funds. And when the fund is no longer under the control of the court, having been paid over by the trustee to the party entitled to retain it, no order for the payment of costs out of the fund can be made, it is said: *Annin's Exrs.* v. *Vandoren's Admr.*, 1 McCarter 135.

By the English statute of 22 & 23 Vict. c. 35, s. 30, executors and other trustees are allowed to petition the courts of equity for direction how to proceed in all matters of discretion affecting the administration of the trust, which they could not do upon general principles, a discretion reposed in a particular person not being subject upon general principles to the control of any court.

It is scarcely needful to say that as this question comes within the range of our discussions in the work on Wills, the foregoing note is little more than an abstract of what is found there, pt. 1, § 36, as we know of nothing new which could be said upon the subject; and we must refer the reader to that place for a fuller abstract of the cases and of the principles involved.

We have found no reason to question the general soundness of the decision in the principal case, and we trust these additional suggestions will prove of interest to the profession.

I. F. R.

Supreme Court of Indiana.

THE AMERICAN EXPRESS COMPANY *v.* CALVIN FLETCHER ET AL.

A person calling himself A. sent a telegram to a bank to send him a sum of money. The bank intrusted the package of money to an express company, which undertook to deliver it to "A. in person." The express company delivered the money to the person who had sent the telegram, but who proved not to be A., but a pretender, and the money was thereby lost.

Held, that the company was liable whether it received the package as a common carrier or as a forwarder only.

APPEAL from the Marion Common Pleas.

The opinion of the court was delivered by

FRAZER, C. J.—Fletcher and Sharp, who were bankers at Indianapolis, sued the appellants for the loss of a package of paper

money, which the latter undertook to convey from Indianapolis to Arcola, Illinois, and to deliver to one "J. O. Riley, in person." It so appears by the receipt given for the package, a copy of which is made a part of the complaint. The complaint is in two paragraphs in the usual form, as against a common carrier,—the first charging a loss by negligence; and the second, that the package was carelessly delivered to another person than Riley, and thereby lost. It is alleged in both paragraphs, that the defendant was a foreign corporation, and a common carrier of goods and money, &c. It is not alleged that it had complied with the provisions of our statute concerning express companies (1 G. & H. 327, § 2), but no question arises as to that.

The answer was—1. The general denial. 2. That the agent of the express company at Arcola was also operator of the telegraph line communicating with Indianapolis; and that a person pretending to be J. O. Riley despatched through the said operator a telegram to the plaintiff, requesting them to send him $1900 by express; that in due time the same agent received by express a package purporting to contain valuables, addressed to J. O. Riley, whereupon the same person who had despatched the telegram, demanded said package, and it was thereupon delivered to him—and that this was the same grievance mentioned in the complaint. 3. That upon the arrival of the package at Arcola, a person presented himself claiming to be J. O. Riley, and demanded the package, and having identified himself as the very person upon whose telegram, despatched on the day previous, in the name of J. O. Riley, the package had been forwarded; thereupon the defendant having no other means of identifying the claimant, and believing him to be the genuine J. O. Riley, delivered the same to him.

Demurrers were sustained to the second and third paragraphs of the answer, and this raises the only question presented for our consideration. The paragraphs are the same in legal effect, and were, in our opinion, not good.

The express undertaking of the appellant was to deliver the package to "*J. O. Riley, in person.*" The utmost that the answer alleged was, that the delivery was to another person, who pretended to be Riley. He identified himself merely as having so pretended on the day before, by transmitting a telegram in Riley's name. This was no better evidence that his name was

Riley, than if he had so stated to the express agent or any third person. That the package had been sent in response to a telegram purporting to be from J. O. Riley, simply proved that Riley had credit, or some arrangement, with the plaintiffs to furnish him money, and that the package was sent to him—not that he was the person who sent the despatch, or that any man pretending to be he was to receive it. The electric fluid was not capable of transmitting the man's autograph, so that the plaintiffs could have any opportunity of detecting an imposition. This the defendant was bound to know, and should have acted accordingly. The failure to act with proper caution was such negligence as clearly rendered the defendant liable for its consequences, even though its liability be limited to that of a forwarder, as was attempted to be done by the receipt given. That liability holds him to ordinary diligence; *i. e.*, such care as every prudent man commonly takes of his own property. The payment of $1900 of a man's own money to a stranger, without requiring him to identify himself as the person really entitled to it, would be an act of very gross carelessness.

Without considering whether the facts pleaded in the second and third paragraphs of the answer would have been admissible in evidence under the general denial, we are of opinion that those paragraphs were justly held bad on demurrer. The class of cases cited in the argument for the appellant, being cases where payment had been made on forged orders, and it was held that money thus paid to an innocent party could not be recovered back unless notice of the forgery had been given on the same day, we do not deem applicable to a case like this. The reason upon which these decisions rest does not exist here.

Judgment affirmed, with two per cent. damages and costs.

Supreme Court of Pennsylvania.

JOHN ALLEN *v.* OSBORN CONRAD.

In an action, under statute, against a judgment-creditor for not entering satisfaction of the judgment, the record showed an execution on the judgment, a rule absolute on the creditor and the sheriff to show cause why the debtor should not pay a certain sum in full satisfaction of the judgment, interest, and costs, and a